MULTIMEDIA DEVELOPMENT CORPORATION SDN BHD v. CLARENCE AUGUSTINE TEE TECK HUO

COURT OF APPEAL, PUTRAJAYA
DAVID WONG DAK WAH JCA
HAMID SULTAN ABU BACKER JCA
HASNAH MOHAMMED HASHIM JCA
[CIVIL APPEAL NO: W-02(A)-1880-10-2016]
23 JANUARY 2018

ADMINISTRATIVE LAW: *Judicial review – Application for – Applicant dismissed from employment on grounds of making fraudulent claims and forged emails – Industrial Court found applicant's dismissal with just cause and excuse – High Court allowed applicant's judicial review application and found applicant had been wrongfully dismissed – Appeal against findings of High Court – Whether High Court erred in substituting findings of Industrial Court*

LABOUR LAW: *Industrial Court – Decision – Applicant dismissed from employment on grounds of making fraudulent claims and forged emails – Industrial Court found applicant's dismissal with just cause and excuse – High Court allowed applicant's judicial review application and found applicant had been wrongfully dismissed – Appeal against findings of High Court – Whether High Court erred in substituting findings of Industrial Court*

The respondent ('applicant') last held position in the appellant ('first respondent') company was as a Senior Manager. Sometime in May 2007 the applicant attended a conference in Boston, USA. Prior to the Boston trip, the applicant submitted his overseas travel claim ('OTA') for a total estimated expenditure of RM21,297 to the CEO for approval. The applicant's OTA was approved by the CEO. Subsequently, the applicant resubmitted the OTA for a total expenditure of RM30,869 when in fact only RM21,297 was approved. The applicant was then leveled with three charges, amongst others, for submitting a falsified OTA for a total expenditure of RM30,869. It was further contended that the applicant had created a fictitious e-mail allegedly sent by Ms Laura of Gold Ripin. This was done by extracting certain parts of another e-mail which was sent by Ms Laura. At the end of the domestic inquiry, the panel of the domestic inquiry found that the applicant guilty of all the three charges leveled against him. The applicant was terminated with immediate effect. Dissatisfied with his dismissal, the applicant filed a representation pursuant to s. 20 of the Industrial Relations Act 1967. The applicant's secretary, one Hajjah Lennie Atikah Ahmad ('COW2') testified that she had prepared the OTA and travel warrants ('TW') on the instructions of the applicant and that it was the applicant who had made the changes to the first page of the OTA and TW. The Industrial Court Chairman accepted the evidence of COW2 as being more credible than the applicant and concluded that the applicant committed

A the acts as stated in the three charges leveled against the applicant. Aggrieved by the decision of the Industrial Court ('second respondent') the applicant filed a judicial review application ('JR application') in the High Court. At the conclusion of the hearing of the JR application, the High Court Judge ('HCJ') allowed the applicant's JR application and remitted the case for assessment
B of compensation for wrongful dismissal *in lieu* of reinstatement. Hence, the first respondent appealed.

Held (allowing appeal with costs; setting aside order of High Court and re-instating award of Industrial Court)
Per Hasnah Mohammed Hashim JCA delivering the judgment of the
C **court:**

(1) The Industrial Court Chairman adopted the correct approach and had applied the correct standard of proof and on the balance of probabilities found that the applicant had committed the acts as in the charges against him. There were overwhelming evidence that the applicant had
D attempted to mislead the Finance Department into believing that the CEO and the Senior Vice President of the Industry Development Division had approved his claim of RM30,869 when in fact, only RM21,297 was approved. The applicant had instructed COW2 to replace the front page of the claim form and had relied on a fictitious
E e-mail in support of his claim. Whether or not payment was made was irrelevant to the applicant and, as a result, the first respondent did not suffer any actual loss. The uncontroverted evidence showed that the applicant had attempted to submit false claim. (para 43)

F **(2)** There was no evidence that the applicant had forwarded a soft copy of that e-mail so that forensic or expert analysis could be made on the said e-mail. Therefore, there was no misdirection by the Industrial Court when it failed to consider that there was no expert evidence to establish the forgery or fabrication as alleged. The Industrial Court Chairman had before him, sufficient audio and visual evidence to come to the
G conclusion that the e-mail was fabricated by the applicant. Furthermore, Ms Laura had *via* e-mail dated 25 May 2007 confirmed that there was no earlier meeting scheduled. (para 45)

(3) The Industrial Court's Chairman had considered and dealt with both these issues on their substantial merits, based on the evidence, the facts
H and the circumstances at the material time and concluded the dismissal of the applicant was with just cause. Thus, the award of the Industrial Court was not tainted by any irrationality or illegality. The HCJ erred by trying to substitute the findings of the Industrial Court with the HCJ's own findings when there was no justification for doing so. (paras 46 & 47)

I

***Bahasa Malaysia** Headnotes*

Pangkat terakhir responden ('pemohon') dalam perayu ('responden pertama') adalah sebagai Pengurus Kanan. Pada bulan Mei 2007 pemohon menghadiri persidangan di Boston, Amerika Syarikat. Sebelum lawatan ke Boston, pemohon mengemukakan tuntutan perjalanan luar negaranya ('OTA') untuk jumlah anggaran perbelanjaan sebanyak RM21,297 kepada Ketua Pegawai Eksekutif untuk kelulusan. Permohonan OTA tersebut diluluskan oleh Ketua Pegawai Eksekutif. Kemudian, pemohon menghantar semula OTA untuk jumlah perbelanjaan sebanyak RM30,869 sedangkan RM21,297sahaja diluluskan. Pemohon kemudian dipertuduh dengan tiga pertuduhan, antara lain, mengemukakan OTA palsu untuk jumlah perbelanjaan sebanyak RM30,869. Dihujahkan bahawa pemohon telah mencipta e-mel rekaan yang didakwa dihantar oleh Cik Laura dari Gold Ripin. Ini dilakukan dengan mengekstrak bahagian-bahagian tertentu e-mel lain yang dihantar oleh Cik Laura. Di akhir siasatan domestik, panel inkuiri domestik mendapati bahawa pemohon bersalah atas kesemua tiga pertuduhan terhadapnya. Pemohon oleh itu, ditamatkan perkhidmatan dengan serta merta. Tidak berpuas hati dengan pemecatannya, pemohon memfailkan perwakilan menurut s. 20 Akta Perhubungan Perusahaan 1967. Setiausaha pemohon, seorang bernama Hajjah Lennie Atikah Ahmad ('COW2') memberi keterangan bahawa dia telah menyediakan OTA dan waran perjalanan ('TW') atas arahan pemohon dan bahawa pemohon yang telah membuat perubahan pada halaman pertama OTA dan TW. Pengerusi Mahkamah Perusahaan menerima keterangan COW2 sebagai lebih berwibawa daripada pemohon dan menyimpulkan bahawa pemohon telah melakukan perbuatan seperti yang dinyatakan dalam tiga tuduhan yang ditujukan terhadap pemohon. Terkilan dengan keputusan Mahkamah Perusahaan ('responden kedua'), pemohon memfailkan permohonan semakan kehakiman ('permohonan JR') di Mahkamah Tinggi. Di akhir pendengaran permohonan JR, Hakim Mahkamah Tinggi ('HMT') membenarkan permohonan JR pemohon dan mengembalikan kes untuk penilaian pampasan untuk pemberhentian secara salah sebagai ganti rugi pengembalian semula. Oleh itu, responden pertama merayu.

Diputuskan (membenarkan rayuan; mengetepikan perintah Mahkamah Tinggi; mengembalikan award Mahkamah Perindustrian)
Oleh Hasnah Mohammed Hashim HMR menyampaikan penghakiman mahkamah):

(1) Pengerusi Mahkamah Perusahaan mengamalkan pendekatan yang betul dan telah menggunakan beban pembuktian yang betul dan pada imbangan kebarangkalian mendapati bahawa pemohon telah melakukan perbuatan seperti dalam tuduhan terhadapnya. Terdapat banyak bukti bahawa pemohon telah cuba menipu Jabatan Kewangan untuk mempercayai bahawa Ketua Pegawai Eksekutif dan Naib Presiden

Kanan Bahagian Pembangunan Industri telah meluluskan tuntutannya sebanyak RM30,869 sedangkan pada hakikatnya hanya RM21,297 telah diluluskan. Pemohon telah mengarahkan COW2 untuk menggantikan halaman depan borang tuntutan dan telah bergantung pada e-mel rekaan untuk menyokong tuntutannya. Sama ada atau tidak pembayaran dibuat tidak relevan dengan pemohon dan kesannya responden pertama tidak mengalami kerugian sebenar. Keterangan yang tidak diakas menunjukkan bahawa pemohon telah mencuba mengemukakan tuntutan palsu.

(2) Tiada keterangan bahawa pemohon telah mengemukakan salinan e-mel supaya analisis forensik atau pakar boleh dibuat terhadap e-mel tersebut. Oleh itu, tidak ada salah arah oleh Mahkamah Perusahaan apabila ia gagal untuk mempertimbangkan bahawa tiada keterangan pakar untuk menubuhkan pemalsuan atau fabrikasi seperti yang didakwa. Pengerusi Mahkamah Perusahaan mempunyai di hadapannya keterangan audio dan visual yang mencukupi untuk membuat kesimpulan bahawa e-mel tersebut dibuat oleh pemohon. Selain itu, Cik Laura melalui e-mel bertarikh 25 Mei 2007 mengesahkan bahawa tidak ada mesyuarat terdahulu yang dijadualkan.

(3) Pengerusi Mahkamah Perusahaan telah mempertimbangkan dan menguruskan kedua-dua isu ini atas merit, berdasarkan keterangan, fakta dan keadaan pada masa yang material dan menyimpulkan bahawa pemecatan pemohon adalah dengan sebab yang adil. Oleh itu, award Mahkamah Perusahaan tidak dicemari oleh sebarang ketakrasionalan atau ketaksahan. Hakim Mahkamah Tinggi terkhilaf apabila cuba menggantikan dapatan Mahkamah Perusahaan dengan dapatan HMT sendiri apabila tidak ada alasan untuk berbuat demikian.

Case(s) referred to:

Bumiputra Commerce Bank Bhd v. Mahkamah Perusahaan Malaysia & Anor [2004] 7 CLJ 77 HC ***(refd)***

Jye Tai Precision Industrial (M) Sdn Bhd v. Victoria Arulsamy [2008] 1 CLJ 760 CA ***(refd)***

KA Sanduran Nehru Ratnam v. I Bhd [2007] 1 CLJ 347 CA ***(refd)***

Milan Auto Sdn Bhd v. Wong Seh Yen [1995] 4 CLJ 449 FC ***(refd)***

Plaintree Wood Products Sdn Bhd v. Mahkamah Perusahaan Malaysia & Anor [2005] 1 LNS 283 HC ***(refd)***

R Rama Chandran v. Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***

Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd [2010] 8 CLJ 629 FC ***(refd)***

Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union [1995] 2 CLJ 748 CA ***(refd)***

Telekom Malaysia Kawasan Utara v. Krishnan Kutty Sanguni Nair & Anor [2002] 3 CLJ 314 CA ***(refd)***

Legislation referred to:
Industrial Relations Act 1967, s. 20

For the appellant - Yong Hong Cheng; M/s Zaid Ibrahim & Co
For the respondent - Max Yong; M/s Shui-Tai

[Editor's note: For the High Court judgment, please see Clarence Augustine Tee Teck Huo v. Multimedia Development Corporation Sdn Bhd & Anor [2017] 1 LNS 543 (overruled).]

Reported by Sandra Gabriel

JUDGMENT

Hasnah Mohammed Hashim JCA:

[1] This is an appeal by the appellant (the first respondent in the High Court) against the decision of the High Court dated 28 February 2017 that allowed the applicant's judicial review application ("JR application"). The High Court granted an order for *certiorari* and quashed the decision of the second respondent and ordered the applicant's claim be remitted for assessment of compensation for wrongful dismissal *in lieu* of reinstatement with costs of RM10,000 to be paid by the first respondent to the applicant.

[2] We heard this appeal on 15 September 2017 and reserved our decision. After perusing the records of appeal, the written submissions filed by the respective learned counsel and upon hearing learned counsel, we adjourned the matter for our consideration and decision.

[3] We now give our decision and the reasons for the same.

[4] We will refer to the parties as they were described in the High Court, the applicant, the first respondent and the second respondent respectively.

Material Facts

[5] This was a substantive JR application filed by the applicant to challenge his dismissal from the services of the first respondent. The applicant was employed by Optica Fibre Technologies MSC Sdn Bhd ("Optica") and was confirmed as its Chief Technology Officer with effect from 16 February 2002. He was then transferred to the Technology Policy and Research Department as Senior Manager - Advanced Technologies with effect from 1 September 2003. The applicant's last held position in the first respondent's company was as the Senior Manager of the Services Cluster Industry Development Division with effect from 3 July 2006.

[6] Sometime in May 2007, the applicant attended a BIO Conference and also to explore the possibility of partnership with the Harvard Medical School-Partners Healthcare Centre of Genetics and Genomics ("HPGCC") in Boston, USA. Prior to the Boston trip, the applicant submitted his overseas travel claim ("OTA") for a total estimated expenditure of RM21,297 to the

CEO for approval. The applicant's OTA was approved by the CEO. Subsequently, the applicant resubmitted the OTA for a total expenditure of RM30,869 when in fact only RM21,297.00 was approved.

[7] The first respondent issued a notice to show cause dated 29 May 2007 to the applicant and required the applicant to submit a written explanation in respect of the allegations made against him by 1 June 2007. The three charges levelled against the applicant are as follows:

(i) The First Charge

"that you on 30 April 2007 had expressly and/or impliedly authorised your Secretary, Hajjah Lennie Atikah Ahmad to submit to Finance Department a falsified Overseas Travel Claim (OTA) for a total estimated expenditure of RM30,869.00 in respect to your official trip to Boston, MA USA between 2 May 2007 and 12 May 2007 knowing that the details contained in the first page of the said OTA were materially different from the OTA that was approved by the Chief Executive Officer of the Company and the Sr. Vice President, Industry Development Division on 27 April 2007 and 25 April 2007 respectively which was for a total estimated expenditure of RM21,297.00 in respect to the same trip to Boston thereby attempting to mislead Finance into believing that the CEO and the Sr. Vice President, Industry Development Division had in fact approved your claim of RM30,869.00 when in fact only RM21,297.00 was approved."

(ii) The Second Charge

"that you had created a fictitious email which you represented as being sent by Gold Ripin, Laura from Boston to yourself and Mr. D.T. Singh at 9.05 PM on 1 May 2007 by extracting parts of another email sent by Gold Ripin, Laura on May 2, 2007 at 11:50PM to compose the said fictitious email which reads "to follow up on the phone conversation that DDT and I had earlier this morning, I spoke to Raju about our agenda for our meeting scheduled for May 4." when in fact, the actual email from Gold Ripin, Laura states "to follow up on the phone conversation that DDT and I had earlier this morning, I spoke to Raju about a different agenda for our meeting scheduled for Sunday, May 6" thereby attempting to mislead the company into believing that you were required to be in Boston on 4th May 2007 instead of 6th May 2007 to attend the meeting with Harvard Medical School-Partners Healthcare System Centre of Genetics and Genomics (HPCGG) in order to justify your travel claims as contained in the false OTA mentioned in Charge 1 above."

(iii) The Third Charge

"that on that days and time stated below; used your secretary, Hajjah Lennie Atikah Ahmad's PC at her workstation on level two (2) of Multimedia Development Corporation Sdn. Bhd. to compose and send the below mentioned emails as if they were being sent by her when she was neither agreeable to nor in control of the contents of the same thereby abusing your position as her superior.

Date of Email	Time Sent	Recipient	cc to	bcc to	Attachments
May 14, 2007	2:06PM	Ella DBG, JD, DCAT	HH, DNK,	-	Memo dated 14/5/07 & Email dated 1/5/07 from Laura Gold Ripin send 9:05PM
May 14, 2007	6:02PM	NFO	DNK, DCAT, JD, HH	-	
May 14, 2007	6:22PM	NFO	-	-	
May 14,	6:39PM	NFO		DCAA	
May 15, 2007	8:49AM	NA:: & NFO	JD, DNK, Ella, DCAT	BG, HH	
May 22, 2007	9:35AM	DNK	DCAT	VS	
May 29, 2007	9:52AM	DCAT	-	-	

[8] The domestic inquiry convened on 19 June 2007 and continued on 25 June 2007. At the end of the domestic inquiry, the panel of the domestic inquiry found that the applicant was guilty of all the three charges levelled against him. The applicant was terminated with immediate effect on 11 July 2007.

[9] Dissatisfied with his dismissal, the applicant filed a representation pursuant to s. 20 of the Industrial Relations Act 1967, and eventually, the said representation was referred to the Industrial Court by Honourable Minister of Human Resources and registered as case number 11/4-297/09.

The Industrial Court's Award

[10] The Industrial Court Chairman considered and evaluated the totality of the oral and documentary evidence before him and concluded that the applicant committed the acts as stated in the three charges levelled against him. The Industrial Court Chairman accepted the evidence of the applicant's secretary, Hajjah Lennie Atikah Ahmad ("COW2") as being more credible than the applicant. COW2 testified that she had prepared the OTA and travel warrants ("TW") on the instructions of the applicant and that it was the applicant who had made the changes to the first page of the OTA and TW. The aforesaid OTA and TW were earlier approved by the CEO and submitted to the Finance Division.

[11] With regards to the fictitious email from Ms Laura of Gold Ripin, the Industrial Court took into consideration the testimony of COW2 who had testified that she received a hard copy of the email from the applicant and that she had never seen the e-mail. Furthermore, the contents of the e-mail appeared to have been taken from another e-mail sent by Ms Laura of Gold Ripin on 2 April 2007. The date the email was sent was 1 April 2007 and it referred to a meeting on 4 May 2007 instead of 6 May 2007 as stated in the actual e-mail sent by Ms Laura of Gold Ripin. The applicant denied that he sent the e-mail. However, no one knew of the existence of the aforesaid e-mail except the applicant.

[12] After the conclusion of the trial, the Industrial Court Chairman handed its Award No. 457 of 2015 which favoured the first respondent. The Industrial Court Chairman found that the applicant was dismissed with just cause and excuse. Aggrieved by the second respondent's decision, the applicant filed this JR application to challenge his dismissal from the first respondent.

At The High Court

The Applicant's Case

[13] Before the High Court, learned counsel for the applicant submitted the following arguments:

(a) The Industrial Court Chairman did not consider the domestic inquiry but proceeded to hear the case *de novo*. The Industrial Court did not consider the validity and relevancy of the domestic inquiry at all.

(b) The Industrial Court Chairman erred in law and in fact when it failed to take into consideration the principles laid down in the case *Bumiputra Commerce Bank Bhd v. Mahkamah Perusahaan Malaysia & Anor* [2004] 7 CLJ 77 which was approved by the Court of Appeal in *Jye Tai Precision Industrial (M) Sdn Bhd v. Victoria Arulsamy* [2008] 1 CLJ 760; [2008] 2 MLJ 57.

(c) The Industrial Court Chairman misdirected himself when it failed to consider that no expert evidence was produced to establish forgery and/or fabrication of the e-mails. The findings were based on suspicion and the best evidence was not adduced or considered by the Industrial Court Chairman.

(d) The standard of proof for fraud in civil cases was beyond reasonable doubt at the time of the award. The correct standard of proof prevailing at that time must be applied. The failure to do so is a great injustice to the applicant. There was no evidence of any intention to deceive on the part of the applicant. The fact that the applicant resubmitted his claims is evidence of his honesty. The OTA was never paid and eventually the applicant had submitted the actual travel claim based on actual expenditure.

The First Respondent's Case

[14] In opposing the JR application, learned counsel for the first respondent submitted the following arguments:

(a) The Industrial Court had applied the correct standard of proof before arriving at its decision.

(b) There is no need for actual loss to be suffered by the employer before action is taken against the employee. The Industrial Court Chairman had addressed the correct question, that is, whether the applicant gave instruction to his secretary to submit a tampered TW to the Finance Department prior to his departure to Boston. The Industrial Court Chairman evaluated all the evidence before him and came to the conclusion and accepted the testimony of the applicant's secretary to be more probable than the applicant's version.

(c) With regards to the principles enunciated in *Bumiputra Commerce Bank Berhad v. Mahkamah Perusahaan Malaysia & Anor (supra)* learned counsel took cognisance of the case but cited the case of *Plaintree Wood Products Sdn Bhd v. Mahkamah Perusahaan Malaysia & Anor* [2005] 1 LNS 283 where Raus Shariff J (as he then was) said that the Industrial Court's function is to consider all the evidence before it and not rely entirely on the notes of the proceedings of the domestic inquiry. The Industrial Court can order to hear the case *de novo*. In the instant case therefore, there was no jurisdictional error by the second respondent.

Decision Of The High Court

[15] At the conclusion of the hearing of the application for judicial review, the learned High Court Judge allowed the applicant's JR application with costs and remitted the case for assessment of compensation for wrongful dismissal *in lieu* of reinstatement. The learned High Court Judge identified five material issues to be determined by the court as follows:

(a) Whether the second respondent erred in law and in fact when it failed to take into consideration the principles laid down in *Bumiputra Commerce Bank Berhad v. Mahkamah Perusahaan Malaysia & Anor (supra)* which was approved by the Court of Appeal in *Jye Tai Precision Industrial* and in hearing the reference *de novo*?

(b) Whether the second respondent applied the wrong standard of proof?

(c) Whether the second respondent erred in law in not taking into consideration the fact that the OTA was resubmitted for approval but no payment was made by the first respondent?

(d) Whether the second respondent erred in law in not taking into consideration the findings of the domestic inquiry that no proper procedure was available for the resubmission of the OTA?

(e) Whether the second respondent erred in law in not taking into consideration that no expert witness was called and/or the maker of the e-mail was not called to testify that the e-mail was fabricated?

[16] The learned High Court Judge was of the considered view that the Industrial Court Chairman erred in law and fact when he neither considered the domestic inquiry that was held nor place any relevancy to it. Instead, he had proceeded to hear the matter *de novo*. In failing to consider the validity and relevancy of the domestic inquiry, the Industrial Court Chairman had misapplied the principles of law pertaining to the relevance of a valid domestic inquiry. The learned High Court Judge referred to several authorities and then said:

> 33. However, since the applicant had relied on the notes of the proceedings of the DI to negate the intention on his part to deceive his superior in the manner as stated in the 3 charges, it was crucial for the 2nd respondent to consider the D1 and its relevancy to the applicant's case before arriving at the award.

[17] The learned judge then concluded as follows:

> 35. In failing to consider the validity and relevancy of the domestic inquiry, the 2nd respondent had misconstrued and misapplied the principles of law pertaining to the relevance of a valid domestic inquiry. Hence, the applicant had demonstrated ample proof of an error of law and, therefore, I was compelled to exercise the judicial review powers of the High Court to issue an order of *certiorari* to quash the Award.

[18] The learned High Court Judge found that the Industrial Court Chairman did not err as he had applied the correct standard of proof for fraud and forgery cases at the Industrial Court, which is on the balance of probabilities.

[19] With regards to the forgery and fabrication of the email, the learned High Court Judge was of the considered view that the Industrial Court Chairman had misdirected himself when he failed to consider the evidence of COW2 and Siti Safinah Salleh, an executive with the first respondent ("COW3"). Her Ladyship opined that if there was an intention to deceive on the part of the applicant, he would not have instructed COW2 to submit his travel claims for approval of the Finance Department as per the revised OTA.

[20] The Industrial Court Chairman had misdirected himself when he failed to consider that no expert evidence was produced to establish the alleged forgery and/or the fabrication of the e-mail. Her Ladyship found that there was no element of deceit because the applicant never receives the payment of the purported claim. The findings were based on suspicion and

the best evidence was not tendered. Her Ladyship concluded that the burden of proof was not discharged in establishing that the e-mail was in fact forged and/or fabricated even on a balance of probabilities.

[21] The learned High Court Judge was of the considered view that there was no intention to "defraud" at the very outset and this manifested in the flaw of the process and procedure of the first respondent.

[22] The learned High Court Judge found that the learned Industrial Court Chairman had committed serious errors of law in arriving at his award. It was further noted that the learned Industrial Court Chairman, amongst others, had taken into account irrelevant considerations, failed to take into account relevant considerations and material facts and had acted against the weight and the totality of the evidence in dismissing the charges against the applicant in entirety.

[23] The learned High Court Judge allowed the judicial review application and issued a writ of *certiorari* to quash the award.

[24] The first respondent dissatisfied with the decision of the learned High Court Judge appealed to this court.

The Appeal

[25] Learned counsel for the first respondent mounted his challenge to the learned judge's quashing of the award primarily on the following grounds and submitted as follows:

(a) The High Court erred in law and in fact when it misapplied the principles propounded in *Bumiputra Commerce Bank Berhad v. Mahkamah Perusahaan Malaysia & Anor (supra)* as clarified in *Plaintree Wood Products Sdn Bhd v. Mahkamah Perusahaan Malaysia & Muhammad Safarudin Chew Abdullah (supra)*. Both the applicant and the first respondent had called the same witnesses who had testified at the domestic inquiry. The Industrial Court Chairman had made a finding of fact and accepted that the first respondent had discharged the burden of proving the three charges based on the evidence of the witnesses. It was submitted by learned counsel for the first respondent that the learned High Court Judge failed to appreciate that even though there was no specific reference made to the domestic inquiry, the Industrial Court had heard the case on merits and concluded that the first respondent had just cause to terminate the services of the applicant.

(b) The High Court Judge erred in fact and in law when it imposed a standard of proof beyond reasonable doubt on the applicant in the second charge. The High Court Judge failed to appreciate that whether the payment was made or not was irrelevant to the charge against the

applicant. The advance payment would have been made to the applicant had the Finance Department not been alerted that the first page of the OTA was materially different than the one that was approved.

(c) The High Court Judge failed to appreciate the first respondent's witness testimony that checks were made with Ms Laura of Gold Ripin who confirmed in writing *vide* e-mail dated 25 May 2007 that there was no such request for the applicant to be in Boston earlier than the date of the conference.

(d) The High Court Judge erred in fact and in law when it found that the Industrial Court Chairman had misdirected himself when he failed to consider that no expert evidence was led to establish forgery and/or fabrication of emails.

(e) Learned counsel for the first respondent submitted that there is no need for actual loss to be suffered by the employer before action is taken against an employee. He referred to the case of *KA Sanduran Nehru Ratnam v. I Berhad* [2007] 1 CLJ 347. In the instant case, the Industrial Court Chairman had addressed the correct question and evaluated all the evidence before him and came to the conclusion that the testimony of COW2 to be more probable than that of the applicant's.

[26] Learned counsel for the applicant responded in its submission in reply as follows:

(a) It was submitted by learned counsel for the applicant that the Industrial Court had misconstrued and misapplied the principles of law regarding to the relevancy of a valid domestic inquiry. The applicant had shown errors of law and as such the High Court was compelled to exercise its judicial review powers to quash the award.

(b) Learned counsel for the applicant further argued that there is no error in the findings of the High Court Judge that there was no intention to deceive or mislead as the applicant had resubmitted his claims for approval when he found changes in the travel plans.

(c) Both the learned Industrial Court Chairman and the High Court Judge had correctly applied the standard of proof based on the balance of probabilities. The applicant failed to call Ms Laura to give evidence but the applicant did call Mr DT Singh (CLW2) who testified that Ms Laura was the one who requested the applicant to go to Boston two days earlier.

(d) The best evidence in discharging the burden of proof would have been the evidence of an expert. However, in this instant case, there was no expert evidence to support the first respondent's case that the e-mails were fabricated.

Our Decision

[27] In the case of *R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147; [1997] 1 MLJ 145 and the case of *Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd* [2010] 8 CLJ 629; [2010] 6 MLJ 1 the Federal Court held that the decision of the inferior tribunal may be reviewed on the grounds of illegality, irrationality and possibly proportionality and the courts are permitted to scrutinise such decisions not only for process but also for substance.

[28] It is trite law that courts should not reverse an award of a tribunal unless there is proven a clear jurisdictional error. A jurisdictional error can arise when a tribunal does not act within the proper scope of its statutory function such as whether it has acted without sufficient evidence or on no evidence, or has misconstrued that law on an issue on which its decision is founded (see: *Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union* [1995] 2 CLJ 748; [1995] 2 MLJ 317).

[29] Where the findings of the Industrial Court are not grounded on illegality or plain irrationality as ruled by the Federal Court in *Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd (supra)*, the High Court should not seek to overturn such findings solely because the High Court Judge might have come to a different conclusion. In the instant appeal before us, the Industrial Court Chairman preferred the first respondent's version rather than the applicant's version after reviewing the evidence of the case in its entirety.

Reference To The Domestic Inquiry

[30] Raus J (as he then was) in *Bumiputra Commerce Bank Berhad v. Mahkamah Perusahaan Malaysia & Anor (supra)* explained with clarity the Industrial Court's jurisdiction, in instances where a domestic inquiry has been held. In his grounds of judgment, His Lordship explained that the jurisdiction was limited to considering whether there was a *prima faci*e case against an employee. In the *Bumiputra Commerce*'s case, the Industrial Court should have first considered whether or not the domestic inquiry was valid and the inquiry notes were accurate. In the absence of such consideration, the Industrial Court's action in proceeding to decide the matter without any regard to the notes of inquiry could not be described as anything more than an error of law.

[31] The factual matrix in *Plaintree Wood Products Sdn Bhd v. Mahkamah Perusahaan Malaysia* is different from *Bumiputra Commerce*. His Lordship, Raus J (as he then was) explained in his written judgment that the issues decided in *Plaintree Wood Product*'s case can be distinguished from that of *Bumiputra Commerce*'s:

Dengan hormatnya saya berpendapat perkara yang diputuskan di dalam kes tersebut adalah berbeza dengan kes pemohon ini. Di dalam kes *Bumiputra Commerce Sdn. Bhd.*, apa yang saya putuskan adalah mengenai kegagalan Mahkamah Perusahaan untuk mengambilkira nota keterangan domestic inquiry yang telah dikemukakan sebagai keterangan. Mahkamah Perusahaan di dalam kes itu tidak langsung merujuk kepada nota keterangan domestic inquiry dalam membuat penilaian fakta dan kegagalan itu telah saya putuskan sebagai suatu kesilapan undang-undang. Di dalam kes pemohon ini, keadaan adalah berbeza. Kes pemohon di Mahkamah Perusahaan adalah masih diperingkat pembicaraan. Pada saya, responden kedua adalah bebas untuk membentangkan kesnya ini dan untuk menyokong dakwaan bahawa beliau telah dibuang kerja tanpa alasan yang munasabah. Di pihak pemohon pula, jika terdapat keterangan mengenai domestic inquiry, terpulanglah kepada pemohon untuk mengemukakannya. Tugas Mahkamah Perusahaan ialah untuk membuat keputusan berpandukan keseluruhan keterangan yang dikemukakan melalui keterangan-keterangan saksi yang dikemukakan oleh kedua-dua pihak. Sudah tentu Mahkamah Perusahaan tidak semata-mata terikat kepada nota prosiding di dalam domestic inquiry. Jadi Mahkamah Perusahaan adalah tidak silap untuk mengarahkan pembicaraan penuh dijalankan di dalam kes ini.

[32] The learned High Court Judge in her grounds of judgment whilst stating that the principles in *Plaintree Wood Product*'s case is applicable in this case, Her Ladyship however, found that the Industrial Court Chairman committed an error of law when he did not consider the domestic inquiry that was held nor did he place any relevancy to it. Her Ladyship concluded that the Industrial Court Chairman had therefore misconstrued and misapplied the principles of law pertaining to the relevance of a valid domestic inquiry.

[33] The function of the Industrial Court is two-fold: firstly, to determine whether the alleged misconduct has been established and secondly, whether the proven misconduct constitutes just cause or excuse for dismissal. Failure to determine these issues would be a jurisdictional error which would merit interference by granting an order of *certiorari* (see: *Milan Auto Sdn Bhd v. Wong Seh Yen* [1995] 4 CLJ 449).

[34] With respect, in our judgment, there is ample evidence to support the several findings of the Industrial Court Chairman for his decision to prefer the evidence of the first respondent. The hearing was conducted *de novo* with *viva voce* evidence. The same witnesses for the applicant as well as the first respondent who had testified at the domestic inquiry were called and were cross-examined at the Industrial Court hearing.

[35] We agree with the submission of learned counsel for the first respondent that even though the Industrial Court Chairman may not have referred or relied to the notes of proceedings of the domestic inquiry, he had

heard the case on its merits. The applicant and the first respondent were given the opportunity to call witnesses to testify in support of their respective case.

[36] As Raus J (as he then was) said in *Plaintree Wood Product*'s case the duty of the Industrial Court is to make a decision based on the totality of the evidence before it through witnesses from both parties. The Industrial Court Chairman need not rely totally on the notes of proceedings of the domestic inquiry and that it is not wrong for the Industrial Court to order a full trial for him to determine whether the alleged misconduct has been established and whether the proven misconduct constitutes just cause or excuse for dismissal.

The Standard Of Proof

[37] It is the contention of the first respondent that the applicant had submitted to its Finance Department a falsified OTA for a total expenditure of RM30,869 in respect of his trip to Boston in May 2007. By doing so, the applicant had attempted to mislead the Finance Department into believing that the expenditure approved by the CEO was RM30,869. It is further contended that the applicant had created a fictitious e-mail allegedly sent by Ms Laura of Gold Ripin confirming that a meeting was scheduled on 4 May 2007. This was done by extracting certain parts of another e-mail which was sent by Ms Laura. There were also discrepancies in the TW. The TW kept in the CEO's office shows the travel dates to be 4 May 2007 for departure and 11 May 2007 for arrival. The TW submitted to the Finance Department the travel dates indicated was 2 May 2007 for departure and 12 May 2007 for arrival. The advance for the Boston trip was not given to the applicant as he had submitted the claim late.

[38] The applicant contended that all the estimates for the Boston trip was prepared and submitted by COW2. He did not doctor or fabricate any e-mail. He went to Boston earlier because CLW2 had arranged a meeting with someone from HPGCC.

[39] Ms Laura of Gold Ripin had confirmed *vide* an e-mail dated 25 May 2007 that no meeting earlier than 6 May 2007 was scheduled and that there was a change in the schedule. COW3 testified that she had sought the confirmation from Ms Laura who confirmed that there were no activities planned that required the applicant to travel to Boston at an earlier date.

[40] COW2 had testified that she was instructed by the applicant to prepare the OTA and TW and that the applicant had made the changes to the first page of the OTA and TW that was earlier approved by the CEO and submitted to the Finance Division.

[41] With regards to the fictitious e-mail from Ms Laura of Gold Ripin, COW2 testified that she had not seen the softcopy of the e-mail but she received the hard copy of the said e-mail from the applicant himself who then asked her to scan it to support his justification for going to Boston earlier than the date approved. CLW2 in cross-examination had testified that he received the e-mail but was unaware of the contents of the said e-mail. The said e-mail was adduced at the hearing and the Industrial Court Chairman found that the e-mail's contents appear to have been taken from another e-mail which was sent by Ms Laura on 2 April 2007. In relation to this, the learned Chairman said:

> As for the fictitious e-mail form Gold Ripin, Laura no one else apart from the claimant had the e-mail. COW-2 had testified that she received a hard copy form the Claimant and never saw the e-mail before. The e-mail's contents appears to have been taken from another e-mail which was sent by Ms. Laura on 2.4.2007.The difference was the date it was sent that was 1.4.2007 and reference to a meeting on 4.5.2007 instead of 6.5.2007 which is on the genuine e-mail. No one else knew about this e-mail.

[42] Abdul Hamid Mohamad JCA (as he then was) in *Telekom Malaysia Kawasan Utara v. Krishnan Kutty Sanguni Nair & Anor* [2002] 3 CLJ 314; [2002] 3 MLJ 129) said that the Industrial Court should not be burdened with the technicalities concerning the different standards of proof or the rules of evidence or procedure that are applied in a court of law. In the instant appeal, we find that both the learned Industrial Court Chairman and the High Court Judge had correctly applied the standard of proof based on the balance of probabilities in a case involving fraud and/or forgery. However, the learned High Court Judge found that the Industrial Court Chairman misdirected himself when he failed to consider the evidence of COW2 and COW3 which in Her Ladyship's opinion goes to the root of ascertaining the applicant's intention to deceive.

[43] We do not agree. We are of the view that the learned Chairman adopted the correct approach and had applied the correct standard of proof and on the balance of probabilities found that the applicant had committed the acts as in the charges against him. There were overwhelming evidence that the applicant had attempted to mislead the Finance Department into believing that the CEO and the Senior Vice President of the Industry Development Division had approved his claim of RM30,869 when in fact, only RM21,297 was approved. The applicant had instructed COW2 to replace the front page of the claim form and had relied on a fictitious e-mail in support of his claim. Whether or not payment was made is irrelevant to the applicant and as a result, the first respondent did not suffer any actual loss. The uncontroverted evidence showed that the applicant had attempted to submit false claim.

Expert Evidence

[44] The learned High Court Judge was of the considered opinion that the Industrial Court Chairman misdirected himself when it failed to consider that no expert was led to establish forgery and/or fabrication of e-mail. In the instant case Laura of Gold Ripin had confirmed *via* e-mail dated 25 May 2007 that there was no earlier meeting as contended by the applicant which required him to be in Boston at an earlier date. COW3 had testified that Ms Laura of Gold Ripin had confirmed that there was no earlier scheduled meeting as alleged.

[45] There was no evidence that the applicant had forwarded a soft copy of that e-mail so that forensic or expert analysis could be made on the said e-mail. We are of the considered view that there was no misdirection by the Industrial Court when it failed to consider that no expert evidence to establish the forgery or fabrication as alleged. We agree with the submission of learned counsel that the Industrial Court Chairman had before him sufficient audio and visual evidence to come to the conclusion that the e-mail was fabricated by the applicant. Furthermore, Ms Laura had *via* e-mail dated 25 May 2007 confirmed that there was no earlier meeting scheduled.

Conclusion

[46] From our observation of the proceedings conducted in the Industrial Court, we detected no impropriety in the judicial-making process. We are satisfied that the Industrial Court's Chairman has considered and dealt with both these issues on their substantial merits, based on the evidence before account the entire evidence, the facts and the circumstances at the material time and concluded the dismissal was with just cause.

[47] Accordingly, since we are satisfied that the reasoning behind the award of the Industrial Court is not tainted by any irrationality nor the award by any illegality, with respect, the learned judge erred by trying to substitute the findings of the Industrial Court with her own findings when there was no justification for doing so. In the circumstances, the appeal is allowed with costs. We set aside the order of the High Court and reinstate the award of the Industrial Court. We order the applicant to pay costs of RM5,000 subject to payment of allocatur to the first respondent. The deposit to be refunded to the first respondent as appellant.